



DECISION

IN THE MATTER OF a motion dated January 29, 2002
by Union of New Brunswick Indians for the award of
costs incurred as an intervenor in the applications by
Enbridge Gas New Brunswick Inc. for approval of its
rates and tariffs and permit to construct

June 11, 2003

NEW BRUNSWICK

Board of Commissioners of Public Utilities

THE NEW BRUNSWICK
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

IN THE MATTER of a motion by the Union of New Brunswick Indians, for the award of costs incurred as an intervenor, in the applications by Enbridge Gas New Brunswick Inc. for approval of its rates and tariffs and permit to construct.

Board:

David C. Nicholson, - Chairman
Jacques Dumont - Commissioner
Robert Richardson - Commissioner

Lorraine R. Légère - Secretary
M. Douglas Goss - Senior Advisor
John F. Lawton - Advisor
William F. O'Connell – Board Counsel
Ellen Desmond – Board Counsel

Enbridge Gas New Brunswick Inc.

Len Hoyt – Solicitor

Union of New Brunswick Indians

Darrell Paul – Executive Director
Norville Getty

INTRODUCTION

The Board issued a decision on costs dated April 26, 2001, in respect of the matter of cost awards to intervenors relating to their participation in the Enbridge Gas New Brunswick Inc. (EGNB) rates and tariffs hearing. The decision identified two broad guidelines issued to assist any party who might consider applying to the Board for costs. The guidelines were:

- (1) When applying for a cost award the applicant should demonstrate how it made a material contribution to a better understanding of the issues by the Board.
- (2) Any party who submits an application for costs should attempt to justify the request for costs on the basis of the public interest. This justification is most important where:
 - The intervention was not to protect a direct or pecuniary interest,
 - The intervenor has funding from other sources, or could have been reasonably expected to obtain funding from other sources,
 - The intervenor failed to make reasonable efforts to negotiate, and
 - The costs of intervention requested are incremental to the normal operating costs of the intervenor.

The Board in its decision stated that it would exercise its discretion to award costs sparingly. It further stated that it would consider the specific interests of the party requesting costs, as well as the interests of the customers who will ultimately be required to pay those costs through rates.

The decision noted that any party applying to the Board for costs must do so by a notice of motion, served on the Board and the party against whom it requested the costs be assessed. The Union of New Brunswick Indians (UNBI) served the Board with a notice of motion, dated January 29, 2002, for their costs of intervention in two EGNB applications.

BACKGROUND

On June 23, 2000, the Board issued decisions concerning two applications by EGNB. The applications were for the approval of its rates and tariffs and for approval of its permit to construct. During the course of the rates and tariffs hearing, the Board decided that the matter of cost awards to intervenors should be dealt with outside that hearing through a written process.

Board Counsel contacted all parties involved in the applications, to advise them of the process and to request their comments with respect to:

- (i) What principles should be applied in determining whether costs are awarded;
- (ii) What guidelines should be applied with respect to assessment of costs; and
- (iii) What procedures should be used for fixing or taxing costs.

The Board established a two step process to consider the application for costs. The first step dealt with entitlement and the second step with quantum. A set of *Guidelines and Considerations* was developed by the Board to be referred to during the review process of the application. All parties who made submissions on costs, had an opportunity to review and comment on a draft form of the guidelines and considerations. The parties also agreed to a written process for the review of the application for costs. EGNB indicated to Board Counsel that separate notices of motion should be filed for each hearing as the level of participation, contribution and costs were likely different for each hearing. UNBI stated that they felt that the issue of costs could be handled through one motion.

On November 28, 2002, the Board sent copies of the *Guidelines and Considerations* and the schedule for the application process to UNBI and EGNB. The schedule as determined was:

Entitlement

Noon, December 6, 2002.....UNBI may re-file its Notice of Motion, after
review of the new Guidelines and Considerations

Noon, December 20, 2002.....EGNB to file its response

Quantum

Noon, January 10, 2003..... UNBI to file its submission

Noon, January 24, 2003..... EGNB to file its response

UNBI filed correspondence with the Board on December 4, 2002 advising that they were still relying on their initial motion to present their arguments and were filing additional supplemental information to that motion. An attachment to the correspondence was filed on December 5, 2002. EGNB filed its response with the Board on December 19, 2002. Board Counsel in correspondence to the parties, dated January 8, 2003, stated that the parties would be advised of revised dates for submissions with respect to quantum, if necessary.

In their filings with the Board, UNBI presented the following arguments in support of their motion for the award of costs.

1. UNBI made a material contribution, which contributed to a better understanding of Aboriginal issues, on the following items.
 - (a) Land claim issues arising from the First Nation's view that the distribution pipeline would be located on Mi'kmag and Maliseet traditional lands regardless of their construction on existing right of ways.
 - (b) UNBI informed the Board on the archaeological record and medicinal plant use and their effects on its people.
 - (c) Provided cogent evidence on benefits provided by companies to Aboriginals in other jurisdictions, notably in the United States and South America.

- (d) Introduced evidence in the Maliseet language by an elder on the culture of the Maliseet and Mi'kmag in New Brunswick.
 - (e) Reviewed the fiduciary responsibility of the Board to the Aboriginal people of New Brunswick.
 - (f) Introduced evidence that the service area maps provided by EGNB did not include all customers in the Fredericton area and excluded the St. Mary's Reserve from the gas distribution system.
2. UNBI was acting in the public interest as it was representing all Aboriginal people of New Brunswick who have a unique relationship with the Province through their Aboriginal and Treaty Rights and also:
- (a) The intervention was not to protect a direct or pecuniary interest but was made on behalf of the First Nations and their people, members of UNBI, their youth and future generations.
 - (b) Attempts to secure funding from other sources were unsuccessful.
 - (c) Made reasonable efforts to negotiate funding for costs from EGNB for intervention which were unsuccessful.
 - (d) Successfully negotiated an agreement with EGNB on the medicinal plant and archaeological studies.
 - (e) Successfully negotiated a Memorandum of Understanding with EGNB.
 - (f) Stated that the costs requested for their intervention were incremental to their normal operating costs.
 - (g) Stated they believe that public interest is called into play when any matter that may or actually does impinge or infringe on their constitutional rights pursuant to Section 35(1) of the Canadian Constitution, 1982, comes before the Board. UNBI states that the Aboriginal People of New Brunswick have Aboriginal title to the land and resources and treaty rights to the use of the resources of the province, and that the Board should adopt a position similar to other jurisdictions which ensures a duty to consult with Aboriginal People.

3. UNBI states they required legal representation to understand the issues, the procedures and to participate effectively.

EGNB's response to UNBI's submission on entitlement for costs, presented the following arguments.

Permit to Construct Hearing

1. An application for costs should attempt to justify the request for costs on the basis of the public interest.
 - (a) UNBI's costs arose from their specific interests of constitutionally protected aboriginal and treaty rights. EGNB did not consider those costs to be justified in the public interest.
 - (b) The Board, in previous rulings, stated that its mandate did not extend to making decisions in relation to Aboriginal and Treaty Rights.
 - (c) Customers of the distribution system should not have to bear UNBI's intervention costs.

2. The Applicant should demonstrate how it made a material contribution to a better understanding of the issues by the Board.
 - (a) In respect of the land claims issue regarding the distribution system, the application was almost entirely on existing right-of-ways near highways and in cities and towns. The Board in its construction decision stated that it was "making no ruling in reference to treaty rights, aboriginal rights or aboriginal title."
 - (b) Some pipeline issues that were raised by UNBI addressed the Maritimes & Northeast Pipeline transmission system, not the distribution system.

- (c) The public information process included numerous meetings with representatives of the aboriginal community. Discussions from those meetings resulted in the relocation of a pipeline due to concern about a potential burial site.
- (d) That its previous work and findings in respect of its Environmental Protection Plan, and the ongoing process to include aboriginal people in its work, presented significant evidence that any further addition to the record by UNBI could not be considered material.
- (e) The testimony of Elder Solomon was not material to the proceeding.
- (f) That counsel for UNBI confirmed that administrative tribunals, such as the Board did not have a fiduciary duty to aboriginal people.
- (g) That proposed service areas only identified the first service priority in order to maximize the availability of natural gas.

Rates and Tariff Hearing

1. The applicant should demonstrate how it made a material contribution to a better understanding of the issues by the Board.
 - (a) UNBI focused on one issue, that the purpose of its intervention was that the costs of negotiating and carrying out any agreement, between EGNB and UNBI, should be included in the rate base.
 - (b) In respect of making a material contribution, the cogent evidence on benefits from the construction of large transmission lines, provided by companies in jurisdictions outside Canada to Aboriginal people, was not particularly relevant.
2. Any application for costs should attempt to justify the request for costs on the basis of the public interest.

- (a) UNBI's intervention that argued for the inclusion of its negotiation costs in rate base was representative of its own narrow interests and not the public interest.
- (b) The Board, in its rate decision, would not approve including unknown expenditures in the cost of service and that EGNB must prove that expenditures for regulatory purposes are prudent and necessary for operation of the utility.

DECISION

The Board concludes that it is appropriate to consider UNBI's entitlement for costs for its participation in the rates and tariffs hearing and the permit to construct hearing separately. The Board has carefully considered the submissions from UNBI and EGNB and reviewed UNBI's participation in the hearings in arriving at its decision. The decision on costs, that established the guidelines for applicants, and the guidelines and considerations document were used by the Board in its evaluation of the submissions by UNBI and EGNB.

Rates and Tariff Hearing

The Board considers that UNBI did not make a material contribution to a better understanding of the issues. UNBI's intervention was focused on issues related to their particular concerns and not on broader issues related to the public's interest. Its costs are not justifiable on that basis. The Board finds no evidence to support UNBI's claim for entitlement to costs for its participation in the hearing.

Permit to Construct Hearing

The principal area of interest in UNBI's intervention was with respect to the land claims issue. The Board, in other procedures, has recommended to UNBI that they approach the Province of New Brunswick and seek a policy directive from it concerning recommendations of the Royal Commission on Aboriginal Peoples. The issue of land claims is outside the jurisdiction of the Board unless UNBI, at the commencement of the hearing, were to:

1. Challenge the constitutionality of New Brunswick's Gas Distribution Act, 1999 (the Act) and
2. Give notice to the Board and the Attorneys General of New Brunswick and Canada and
3. Specify in the notice its claim to Aboriginal title and the remedy sought.

UNBI participation in the proceedings did not challenge the constitutionality of the Act nor did it serve notices to the Board and the attorneys general.

Cultural evidence provided by Elder Solomon and cogent evidence on benefits to Aboriginals in other jurisdictions introduced by UNBI was informative, but it did not contribute to a better understanding of the issues in respect of the hearing. The evidence stated that UNBI had successfully negotiated an agreement with EGNB on medicinal plant and archaeological studies. The Board finds no basis for entitlement to costs for UNBI's participation in the hearing.

DATED at the City of Saint John this 11th day of June 2003.

BY THE BOARD

Lorraine R. Légère
Secretary